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STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
NEW JERSEY STATE BOARD OF DENTISTRY

In the Matter of the Suspension)	
or Revocation of the License of)	Administrative Action
MARK S. HIRSCH, D.D.S.)	
To Practice Dentistry in the)	DECISION
State of New Jersey)	AND
	ORDER

This matter was opened to the New Jersey State Board of Dentistry upon receipt of a report of a "positive urine" for Mark S. Hirsch, D.D.S. from the Perth Amboy Division of the Raritan Bay Medical Center, the party responsible for monitoring Dr. Hirsch's urine pursuant to the January 7, 1988 Consent Order in this matter. Hearings were held in this matter on September 28 and September 29, 1988. The Attorney General was represented by Kathy Rohr, Deputy Attorney General; Dr. Hirsch was represented by Alice B. Newman, Esq.

DISCUSSION

On July 1, 1987, Dr. Hirsch appeared before the Board of Dentistry upon the application of the Attorney General for an order temporarily suspending Dr. Hirsch's license to practice dentistry based on allegations relating to Dr. Hirsch's drug addiction. By Order entered July 4, 1987, Dr. Hirsch's license was temporarily suspended pending a plenary hearing on the underlying administrative complaint; the suspension was stayed so long as Dr. Hirsch complied with prescribed supervisory and monitoring conditions concerning his drug use. The Administrative Complaint was resolved by

way of a Consent Order filed on January 7, 1988. In pertinent part, the Consent Order provides:

Respondent [Dr. Hirsch] hereby consents to the entry of an Order of automatic suspension of his license without notice upon the Board's receipt of any reliable information such as, but not limited to, a report of a confirmed positive urine from the party responsible for monitoring respondent's urine, information from any treating psychologist, or information from any outpatient program, which reveals evidence of substance abuse during the probationary period.

The Consent Order further provides:

Respondent shall have the right to apply for removal of the automatic suspension on two (2) days notice but in such event shall be limited to a showing that urine tested was not his or was a false positive, in the case of urine testing, or that other information submitted was false.

On Monday, September 26, 1988, the Board, through its Executive Director, William Gutman, was advised by Vincent Romain, a counselor at the Raritan Bay Medical Center, Perth Amboy (the party responsible for testing Dr. Hirsch's urine pursuant to the Consent Order) that Dr. Hirsch's urine had tested positive for cocaine on Monday, September 19, 1988. Dr. Arnold Graham, the Board President, was notified of the positive test on that same date (September 26). Rather than automatically activating the suspension of Dr. Hirsch's license as permitted by the terms of the January 7, 1988 Consent Order, Dr. Graham directed that Dr. Hirsch appear before a committee of the Board on Wednesday, September 28, 1988 to offer testimony and/or evidence concerning the incident.

Dr. Hirsch appeared with counsel, Alice B. Newman, Esq., before the Board on September 28, 1988. At this appearance, Dr. Hirsch testified as to the circumstances surrounding his urine monitoring and the positive urine test. Additionally, Dr. Barbara McCrady, Ph.D., Director of the New Jersey Impaired Dentists Program, offered testimony on Dr. Hirsch's behalf. Dr. McCrady testified as to the progress of Dr. Hirsch's recovery and offered limited testimony as to drug screening and drug tests. From the testimony presented at this appearance, the Board learned the following:

Pursuant to the January 7, 1988 Consent Order, Dr. Hirsch submitted to urine monitoring on Monday, September 19, 1988 at the Raritan Bay Medical Center, Perth Amboy Division.* Dr. Hirsch's urine was analyzed by a drug test called EMIT. This test indicated that Dr. Hirsch's urine tested positive for the presence of cocaine. On or about September 23, 1988, Dr. Hirsch received a telephone call from Vincent Romain, his counselor at Raritan Bay Medical Center. Mr. Romain advised Dr. Hirsch that his September 19th urine had tested positive for cocaine.** On Monday, September 26, *Paragraph 6 of the January 7, 1988 Consent Order provides, in pertinent part: "Respondent shall have his urine monitored on a random basis two (2) times weekly with direct witnessing of the samples to be performed by a drug counsellor at Perth Amboy Hospital or another designee of the Board."

** Dr. Hirsch submitted urine for testing on September 12, 1988, September 13, 1988 and September 20, 1988. All of these tests were negative.

1988, Dr. Hirsch went to see Mr. Romain at the Raritan Bay Medical Center. Mr. Romain advised Dr. Hirsch that they had performed another EMIT test on the September 19, 1988 urine sample and that this test had also come back positive for cocaine.

The two EMIT tests were the only tests performed on Dr. Hirsch's urine by the Raritan Bay Medical Center. The Raritan Bay Medical Center did not keep the remainder of Dr. Hirsch's September 19, 1988 urine sample; consequently, further testing could not be done. It was also learned that on some occasions, Dr. Hirsch would know several days in advance when his urine was to be tested. For instance, Dr. Hirsch testified that he knew on Friday, September 16th, that he was to be tested on Monday, September 19, 1988. Questions arose during Dr. Hirsch's appearance on September 28, 1988 concerning whether the September 19th positive urine was a "confirmed positive urine" within the meaning of the January 7, 1988 Consent Order and whether the September 19th positive urine could be a "false positive." No competent, reliable testimony was presented on September 28, 1988 to address either issue. For instance, when discussing drug testing, Dr. McCrady testified that she was not an expert in that area but was repeating to the Board information she had learned from John D. Slade, M.D., a physician associated with the Impaired Dentists Program who has expertise in drug testing. Similarly, both

Deputy Attorney General Rohr and Ms. Newman summarized for the Board information they had learned from physicians and experts they had consulted. No witnesses competent to speak to drug testing issues or to answer questions from the Board were presented.

Based on the evidence presented at that time (a positive test for cocaine; no competent evidence presented as to possibility of a "false positive"; no competent evidence presented that the testing of Dr. Hirsch's September 19th urine sample twice by the EMIT test did not constitute a confirmed positive urine within the meaning of the Consent Order) and in light of the potential threat to the public health, safety and welfare and pursuant to the terms of the Consent Order, Dr. Hirsch's license was suspended. Additionally, pursuant to the terms of the Consent Order, Dr. Hirsch was given the opportunity to apply for removal of the automatic suspension on two days' notice. Dr. Hirsch immediately exercised his option to apply for removal of the automatic suspension. The Board authorized its President, Dr. Arnold Graham, to take testimony and render a decision in this matter at any hearing held pursuant to Dr. Hirsch's request.

On September 29, 1988, Dr. Graham convened the hearing called at Dr. Hirsch's request to remove the automatic suspension of his license. Dr. Hirsch presented one witness, John Slade, M.D. Deputy Attorney General Rohr presented one witness, William Vilensky, D.O. Both witnesses were presented by way of speaker-phone

(Dr. Slade was at home recuperating from recent surgery; Dr. Vilensky also was at home). Both Dr. Slade and Dr. Vilensky have extensive credentials and expertise in the areas of drug dependency, drug testing and drug treatment.

Dr. Slade testified as to the different types of tests used to test for the presence of drugs. He further testified that the EMIT test is a test with high sensitivity that may generate false positives approximately 1% to 5% of the time. Because of the high sensitivity of the EMIT test, Dr. Slade testified that it is usual and customary practice for a laboratory to perform a second and different confirming test to confirm the presence of drugs. Additionally, Dr. Slade stated that the second confirming test should not be the EMIT test performed again, but rather a different type test, such as gas-liquid chromatography or gas chromatography/mass spectrometry.

Dr. Vilensky testified that the EMIT test has a high confidence rate and is also considered highly accurate. Dr. Vilensky also testified that some laboratories will verify the results of a positive EMIT test by doing a second EMIT test. Dr. Vilensky further testified that another different test is then run to confirm the original findings.

Based on the testimony presented on September 28 and September 29, 1988, the Board makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Dr. Hirsch submitted a urine sample for testing to the Raritan Bay Medical Center, Perth Amboy Division on September 19, 1988. Using the EMIT test, Dr. Hirsch's sample tested positive for cocaine. Dr. Hirsch was notified of the positive test on September 23, 1988. On or before September 26, 1988, a second EMIT test was run on Dr. Hirsch's urine; this test also indicated a positive for cocaine. The Raritan Bay Medical Center did not run a second different test on Dr. Hirsch's urine. The Raritan Bay Medical Center did not keep the remainder of Dr. Hirsch's September 19th urine sample and consequently no further testing of the sample could be done. The Board of Dentistry was notified of Dr. Hirsch's positive urine on September 26, 1988.

2. The EMIT test is an accurate drug screening test with a low rate of false positives for cocaine. While it is possible that an EMIT test positive for cocaine is a false positive, there is also a high likelihood that if the urine tests positive, cocaine is present.

3. Dr. Hirsch often knew several days in advance when his next urine test would be and consequently his urines were not truly monitored on a random basis.

CONCLUSIONS OF LAW

1. The use of a second EMIT test on Dr. Hirsch's positive urine is not a confirming test within the meaning of the January 7, 1988 Consent Order. Therefore, there was no "confirmed positive urine"

within the strict meaning of the Consent Order.

2. Because the Board has found that the EMIT test has a low rate of false positives for cocaine, it believes that although the results of Dr. Hirsch's urinalysis (2 EMIT tests showing positive for cocaine) could have been false positives, it is far more likely than not that they were true positives. Consequently, the Board finds sufficient reason to modify the frequency of testing.

This Order memorializes the decision and order of the Board as articulated by Dr. Graham on September 29, 1988 and the terms of this Order are effective September 29, 1988.

IT IS, THEREFORE, ON THIS 19th DAY OF DECEMBER, 1988,

HEREBY ORDERED THAT:

1. The suspension of Dr. Hirsch's license to practice dentistry which was imposed on September 28, 1988 is removed effective September 29, 1988.

2. The location for the urine monitoring required by the January 7, 1988 Consent Order and currently performed at the Raritan Bay Medical Center, Perth Amboy Division, shall be changed to a location, to be determined by the Board, which performs a second, different confirming test on urines which initially test positive for the presence of drugs.

3. Dr. Hirsch shall have his urine monitored on a random basis three (3) times a week for the next six (6) months. If, at the end of the six month period, all Dr. Hirsch's

urines have demonstrated the absence of addictive substances, the frequency of monitoring shall revert to two times a week.

At such time as Dr. Hirsch's urine is again monitored on a two times a week basis, Dr. Hirsch's urine shall not be monitored on two consecutive days during a week.

4. The costs of the urine monitoring shall continue to be borne by Dr. Hirsch.

A handwritten signature in cursive script, reading "Arnold Graham", followed by a stylized monogram or set of initials.

ARNOLD GRAHAM, D.D.S.
PRESIDENT
STATE BOARD OF DENTISTRY